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THE INDIAN ACT: PROPOSED MODIFICATIONS

INTRODUCTION

The deficiencies of the *Indian Act* are well documented. For many years, aboriginal peoples have criticized the Act as oppressive and paternalistic, while the federal government has acknowledged that the legislation provides an inadequate framework for its contemporary relationship with Indian communities. Despite its limitations, the Act has been subject to few amendments since its last major revision in 1951. The problems identified over the years are many and relate both to the broad framework and principles underlying the Act and to its specific provisions. In brief, problems include a high degree of federal control over land use decisions that hinders economic development; the limited by-law making powers of bands; band justice enforcement; control of Indian status and band membership; restrictions on band control over Indian moneys; and ministerial supervision of band elections.⁽¹⁾

On 12 December 1996, Minister of Indian Affairs and Northern Development Ronald Irwin tabled Bill C-79, the *Indian Act Optional Modification Act*, proposing amendments to numerous sections of the *Indian Act* that would apply to those First Nations that chose to opt into them. This initiative came after 18 months of consultations with Indian leaders and followed a series of attempts by previous governments to find alternatives to the Act. This paper briefly describes the development of the Act up to the current proposals. It shows a repeated cycle of study and proposals for reform, followed by limited change. The paper then reviews and discusses the amendments, focusing on the most significant.

(1) Problems have been enumerated in reports of governments, First Nations and other organizations. See for example Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, Volume 1, Looking Forward, Looking Back*, Ottawa, Ministry of Supply and Services, 1996, p. 282-319.

While the Act has served as an instrument of oppression and assimilation, it has also provided certain rights and protections for Indian communities, and continues to do so. These conflicting roles, and the different approaches of the federal government and Indian groups to aboriginal self-government, have formed stumbling blocks to *Indian Act* reform. A discussion of this dilemma forms the final section of the paper.

BACKGROUND

A. 1876 to 1951

The *Indian Act* is the principal legislation through which the federal government exercises its constitutional authority over Indians and lands reserved for Indians. It is a comprehensive Act, regulating most aspects of First Nations life. Provisions of the Act cover Indian status and band membership; the organization and exercise of band government, elections and by-laws; taxation; Indian lands and resources; the management of Indian moneys, wills and estates; and education.

The first *Indian Act*, passed in 1876, consolidated and revised Indian legislation in the existing Canadian provinces and territories. Between 1876 and 1951 the Act was amended on numerous occasions.⁽²⁾ These changes related to the settlement of western Indians on reserves, the conversion of Indians to an agricultural way of life, enfranchisement,⁽³⁾ and the prohibition of traditional practices. While amendments were made almost annually, the Act's fundamental principles -- the civilization, assimilation and protection of Indians -- remained unaltered, as did its main structure. In general, changes served to increase government control and reduce the autonomy of Indian bands. The Act was consolidated in 1927, but by 1938, the Indian Affairs Branch recognized that many elements of the 1927 Act were inadequate and began to prepare revisions. This activity was interrupted by World War II, however, and few changes were made until 1951.

(2) For a history of the development of the Act, see J. Leslie and R. Maguire, *The Historical Development of the Indian Act*, Indian and Northern Affairs Canada, 1978; and J. Taylor, *Canadian Indian Policy During the Inter-War Years, 1918-1939*, Indian and Northern Affairs Canada, 1984.

(3) Enfranchisement was a process by which an Indian gave up Indian status and band membership. It was abolished by 1985 amendments to the *Indian Act*.

B. 1950s - 1980s

Between 1946 and 1948, a Special Joint Committee of the Senate and House of Commons conducted a detailed review of the *Indian Act*. The Committee heard from many witnesses, including aboriginal representatives and federal government officials. The hearings drew public attention to the poor living conditions on reserves and gave Indians an opportunity to criticize government interference in band affairs, enfranchisement, and non-fulfilment of treaties. The Committee's proposals reflected few of the Indian priorities, however. The Committee recommended a complete revision of the Act "to remove many of its coercive measures without altering its assimilative purpose."⁽⁴⁾

The revised *Indian Act* of 1951 did not differ in many ways from the previous legislation. The major elements regarding lands, property, local government, and Indian status remained intact. An Indian register, a centralized record of those entitled to Indian status, was introduced and the rules for Indian status were made more restrictive. A new section 87 (now 88) made provincial laws of a general nature applicable to Indians on reserve. The changes did reduce the role of the Minister of Indian Affairs and provide for greater autonomy in reserve management. Laws banning the potlatch and other ceremonies were revoked, as was the prohibition on Indians entering public bars.

In 1959 another joint committee was appointed to examine the *Indian Act*. This review resulted in the removal of provisions allowing compulsory enfranchisement for men and bands in 1961. In early 1967, faced with continuing social and economic problems on reserves, demands from Indians for greater autonomy, and public criticism of the Indian Affairs Branch, the government again decided to revise the *Indian Act*. Between July 1968 and May 1969, federal officials carried out a series of consultations throughout Canada to identify changes that should be made to the legislation. The consultations elicited a wide range of opinions from Indian leaders, but there were common calls for the government to honour special rights and address historic grievances, and to permit Indians to participate in policy-making.⁽⁵⁾ In stark contrast to these suggestions, in June 1969 the government tabled the

(4) J. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, University of Toronto Press, Toronto, 1991, p. 221.

(5) S. Weaver, *Making Canadian Indian Policy: The Hidden Agenda, 1968 - 1970*, University of Toronto Press, Toronto, 1981, p. 5.

White Paper on Indian Policy. It called for the repeal of the *Indian Act* and an end to most special rights for Indians. A ground swell of negative reactions to the proposals from Indian groups provoked the withdrawal of the White Paper in 1971, and the *Indian Act* remained unchanged.

In 1983, following the recognition of aboriginal rights in the 1982 Constitution, a Special Committee of the House of Commons was appointed to examine Indian self-government. In the Committee's hearings, Indians were critical of the Act for its failure to provide a legal framework within which they could control their own communities. In an appearance before the Committee, the Minister of Indian Affairs pointed out a number of restrictions in the Act:

- the exercise of many band powers was subject to control by the Minister or Governor in Council;
- the land tenure system limited the use of reserve land by bands and individuals;
- trust responsibilities of the Minister prevented band governments from controlling their own assets;
- band governments had few legislative powers in social and economic development; and
- the legal status of bands to contract with other entities was unclear.⁽⁶⁾

The Committee recommended that legislation be passed to provide a framework for Indian self-government. It called the policy basis of the *Indian Act* "antiquated," and said that the structure was an unacceptable blueprint for the future. The Committee recommended against amending the *Indian Act* as a route to self-government.

C. Bill C-31

Passed by Parliament in June 1985, Bill C-31 brought about the first substantial amendments to the *Indian Act* since 1951. The bill had three major goals: to remove discrimination based on gender and marital status in the *Indian Act*; to restore Indian status to

(6) House of Commons, Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee*, Minister of Supply and Services, Ottawa, 1983, p. 21.

those entitled to be registered under the amended legislation; and to enable Indian bands to assume control over membership. It also abolished the practice of enfranchisement and gave bands new powers to regulate alcohol use and residence on reserves. The changes meant that women would no longer gain or lose status as a result of marriage. The 1985 amendments led to rapid growth in the status Indian population as some regained status or registered as Indians for the first time.

D. Lands, Revenues and Trusts Review

In 1986, the report of the Auditor General criticized DIAND's administration of the *Indian Act*. It focused on the department's capacity to manage its responsibilities for Indian lands, revenues, and trusts. This criticism led to a management review which had evolved by 1988 into a full-scale review of the major aspects of the Act. The three-phase Lands, Revenues and Trusts Review was a comprehensive evaluation intended to propose changes to the *Indian Act*, to develop new policies and mechanisms to respond to legislative changes, and to provide adequate training and resources to permit the department and First Nations to administer the legislation.

In the first phase, managed by the Office of the Comptroller General, consultants' studies and internal reports set forth a range of issues and options. DIAND assumed responsibility for Phases II and III of the review. The second phase, begun in 1988, featured consultation with Indian organizations and the development of options for change.⁽⁷⁾ It focused on seven areas: land management, land registry, Indian moneys, estates, by-laws, band membership and elections. Recommendations for implementing changes and developing amendments or alternatives to the *Indian Act* during Phase III were identified in a 1990 report. A guiding principle of the process was that proposals for change, including legislative changes, would be primarily optional, allowing bands themselves to decide when they wished to take on increased responsibility.

(7) See Indian and Northern Affairs Canada, *Lands Revenues and Trusts Review: Phase I Report*, Ottawa, Ministry of Supply and Services, 1988, and *Phase II Report*, 1990.

E. 1988 Amendments

While the broader review of the legislation was going on, several amendments were made to the *Indian Act* in 1988. Bill C-115, known as the Kamloops Amendment, was intended to clarify the legal status of conditionally surrendered reserve lands and facilitate the ability of bands to develop their lands through leases to non-Indians. The amendment also increased band powers by granting band councils the authority to levy local taxes on Indian and non-Indian persons with interest in reserve lands.

Bill C-123, which was passed in August 1988, amended the *Indian Act* to provide the Minister with the general authority to make payments to parents or guardians. This formalized a practice that had been going on for some time. It also provided a framework within which band councils could authorize minors' trust accounts and a surviving spouse's preferential share of an estate.

F. *Indian Act* Alternatives Process

As the Lands, Revenues and Trusts Review moved into Phase III, it was succeeded by the *Indian Act* Alternatives Process. In 1990, a number of chiefs approached the department with a proposal to explore legislative reform of some aspects of the *Indian Act*. The department agreed to provide technical and financial support to the chiefs' working groups. Their intent was to develop alternatives to particular sections of the *Indian Act* that First Nations could choose to opt into.

Initially five groups of chiefs took on six priority areas: Indian moneys and estates; forestry resources on reserves; direct taxation; governance, including band elections; management of reserve lands; and an Indian regulatory gazette. Though varying amounts of progress were made in each area, the process proved to be controversial for Indian bands and leaders. Chiefs involved in the process were accused of selling out by some other chiefs, and the exercise was criticized by the Assembly of First Nations, the national status Indian organization. Meanwhile, the Minister of Indian Affairs required a cross-country consensus among Indian bands, an unlikely scenario, before taking legislation to Parliament.⁽⁸⁾

(8) B. Doern, "The Politics of Slow Progress: Federal Aboriginal Policy Processes," a study prepared for the Royal Commission on Aboriginal Peoples, 1994.

By late 1992, the chiefs had four major legislative initiatives under discussion; a First Nations Chartered Land Act, a First Nations Forestry Resources Management Act, a First Nations Moneys Management Act, and a First Nations Governance Recognition Act. This narrowed to formal proposals in three areas -- lands, forestry and moneys -- by 1993. The land Act would enable bands to opt out of the land management sections of the *Indian Act* and manage lands through a land charter approved by the community; the forest Act would allow bands to manage forest resources on reserve; and the moneys legislation would give bands the authority to request the transfer of certain moneys held on their behalf in the Consolidated Revenue Fund.

None of these initiatives has yet resulted in final legislation. While a Chartered Lands bill was to be tabled in Parliament in June 1993, it met with opposition from some First Nations that had not participated in the process and raised concerns about unilateral amendment; therefore, no bill was tabled prior to the 1993 election. In February 1996, chiefs from 13 First Nations (most of whom had been involved in the Chartered Lands initiative) and the Minister of Indian Affairs signed a Framework Agreement on First Nation Land Management to enable those First Nations to manage their own land and resources. A fourteenth First Nation subsequently became a signatory. It is intended that the Framework Agreement will be given effect through legislation and ratified by each First Nation as part of the opting-in process. Bill C-75, federal legislation to ratify and implement the Framework Agreement, was introduced in the House of Commons on 10 December 1996.

First Nations that were parties to the agreement would be able to develop their own land codes, setting out the basic law to govern lands and interest in land and resources after the land provisions of the *Indian Act* were withdrawn from the community. While First Nations would be able to pass laws regarding development, conservation and use of First Nation land, and control the issuance of leases and licences, they would not be able to transfer the title to any of their lands, and the existing protections against taxation and seizure under legal process would continue.

THE PROPOSED INDIAN ACT MODIFICATIONS

A. The Amendment Initiative

The Minister of Indian Affairs launched the amendment initiative with a letter to First Nation leaders on 4 April 1995. At that time, he requested that they consider possible short-term amendments to the Act, focusing on its most archaic provisions. The letter suggested a number of sections that could be changed, but contained the Minister's assurances that he would proceed only with specific amendments that had strong support from First Nations. A second letter, dated 1 September 1995, reported on progress up to that time. It noted that the department had received 61 responses representing 214 First Nations, many of which were supportive of the proposed changes. The September letter included an interim list of amendments under consideration which had been compiled from the responses of First Nations, suggestions raised by First Nations in the course of everyday business with DIAND, and proposals made by the department. Amendments were proposed primarily to sections of the *Indian Act* dealing with reserve lands, natural resources, estates, Indian moneys, elections, by-laws and education. Controversial areas such as Indian taxation, registration and membership were not addressed. An additional list of amendments was circulated in June 1996.

The Minister received permission from Cabinet to draft legislation for the amendments in June 1996. A detailed list of proposed changes was released in September. This prompted a strong negative reaction from some segments of the First Nation leadership.⁽⁹⁾ Ovide Mercredi, chief of the Assembly of First Nations (AFN), charged that the Minister had not properly consulted First Nations about the planned changes, which would, in fact, have a major impact. His primary concern was with the land-related provisions, particularly a proposed change to section 89(1.1), which would allow the use of leased land on reserve as security for loans, and the proposed amendments to section 21, which would set up a system for registering an individual's interests in land that would take priority over any unregistered

(9) See R. Platiel, "Mercredi Blasts Indian Act Proposals," *Globe and Mail*, 12 September 1996; Assembly of First Nations, "Speech by National Chief Ovide Mercredi, Special Chiefs Assembly on Amendments to the *Indian Act*, Winnipeg, 23 September 1996; letter from Ovide Mercredi to the Right Honourable Jean Chrétien re proposed amendments to the *Indian Act*, 3 December 1996.

or custom arrangements. The AFN charged that the proposals were a step toward eliminating protection for Indian lands and were contrary to concepts of communal land ownership held by Indian people. Mercredi also criticized proposed section 16.1 which would legally define the term "band" as an entity that can sue and be sued, arguing that this definition does not reflect the identity and culture of First Nations people. As well, the AFN asserted that the federal government was using the amendments as a means of diminishing its responsibilities for Indians. On 5 December, the AFN tabled the results of a survey, reporting that over 85% of First Nations rejected the proposed amendments and the amendment process.⁽¹⁰⁾

B. Bill C-79

Bill C-79, whose short title is the *Indian Act Optional Modification Act*, was tabled and given first reading in the House of Commons on 12 December 1996. A number of revisions were made in response to the objections raised by First Nations, leaving the bill a watered-down version of the earlier proposals. Most significantly, the bill would allow First Nations to opt into the package of changes to the Act. The existing *Indian Act* would continue to apply in other areas and those First Nations that did not choose the package would still be covered by the current Act. The bill also includes a non-derogation clause, stating that the amendments should not be construed in a way that would derogate from aboriginal and treaty rights.

Some of the more significant proposals are considered below.⁽¹¹⁾

1. Band Elections

Section 78 (1) would be amended to increase from two to three years the term of office of chiefs and councillors who are subject to the *Indian Act* election provisions (rather than custom). This is intended to increase the stability and control of band governments.

(10) Assembly of First Nations, Press Release, "National Chief Tables Result of First Nation Consultation on Rejection to *Indian Act* Amendments," 5 December 1996.

(11) For a full description and analysis of the bill, see forthcoming Legislative Summary 280E, An Act to permit certain modifications in the application of the *Indian Act* to bands that desire them, Library of Parliament, Ottawa.

Section 75 would be amended to require a candidate for chief to be an elector of the band. (An elector is defined as a member of the band who has attained the age of 18 years and is ordinarily resident on the reserve.) Currently, the Act specifies that councillors must be electors of the band but candidates for chief are not subject to the same requirement. This provision has caused electoral controversies. It resulted in a legal challenge when members of the Sturgeon Lake Indian band elected a chief who was not registered under the *Indian Act*, but who was married to a member of the band. The court found that the chief need not be an "elector" in order to be a chief, although it was clear that councillors must be "electors."⁽¹²⁾

2. Legal Capacity of Bands

Under a new section 16.1, bands would have the same rights, obligations and capacities as a person; for example, the right to sue and be sued and the right to hold land. This would establish a legal basis for First Nations to deal with other levels of government and other corporate bodies, to sue, and to acquire additional land.

3. Band By-laws

Section 81 of the *Indian Act* empowers chiefs and councillors to adopt by-laws to deal with local government (e.g. zoning, traffic, residency, fish and game), intoxicants and property taxation. Among other proposed changes are:

- a new paragraph 81(1)(h.1) would give band councils additional powers with respect to the allocation of lands and landlord-tenant relationships, including eviction and allocation of band-owned houses. A legislative void currently exists in this area and the provision is intended to reduce difficulties caused by the non-payment of rent, poor maintenance of houses, and occupation of houses without authorization;
- a new paragraph 81(1)(o.1) would give bands additional authority for natural resources such as hay, wild grass, wild rice and shrubs, thus expanding First Nations management of natural resources;

(12) *Goodswimmer v. Canada (Minister of Indian Affairs & Northern Development)*, [1995] 3 C.N.L.R. 72, 93 F.T.R. 79, 180 N.R. 184(C.A.)

- a new paragraph 81(1)(p.5) would enable First Nations to regulate the financial administration of the band and the accountability of the chief and council of the band members;
- changes to paragraph 81(1)(r) would increase the maximum fine for violations related to by-laws from \$1,000 to \$5,000. This is one of several proposed changes to increase fines to \$5,000, thereby making the amount consistent throughout the Act and increasing the potential revenue from fines.

4. Education

An amendment to section 114 would enable the Minister to enter directly into agreements with First Nations for the education of children, rather than having to obtain an order in council before such agreements could be implemented.

PERSPECTIVES ON THE PROPOSALS

During the process leading up to the tabling of the bill, the Minister of Indian Affairs said that he was committed to revising the Act only if there was significant First Nation support.⁽¹³⁾ The criticism of proposals released in September resulted in final amendments that were much less extensive and less forceful, given their optional nature, than the Minister had originally desired. The federal government takes the position that these are minor amendments, intended to remove archaic and offensive sections of the Act and obstacles that restrict the daily operations of Indian bands. The amendments are described as an interim measure and are not intended to undermine aboriginal or treaty rights or to alter the Crown's fiduciary obligations.

The amendment initiative continues to meet with opposition from some First Nation leaders, however, and has caused divisions between them. After consultations with Minister Irwin that led to the amendments becoming optional and to the inclusion of the non-derogation clause, the First Nations leadership in Saskatchewan and Manitoba agreed that the

(13) Department of Indian Affairs and Northern Development, News Release, "Minister Releases Potential Indian Act Amendments," 18 September 1996.

process should go forward. In contrast, national chief Ovide Mercredi remains strictly opposed to the amendments. Subsequent to the tabling of the bill, Chief Mercredi called an emergency assembly of the AFN on 19 December. The organization continues to express its concern over the potential impact of specific provisions of the bill, including: the lack of a requirement for community ratification before opting into the legislation; the absence of an opt-out provision; the legal capacity of bands; and the concentration of further power in the hands of the Minister. More generally, the AFN has accused the government of inadequate consultation with First Nations on Bill C-79, and argues that the proposed amendments are inconsistent with the government's recognition of the inherent right of self-government. The organization has called for Canada to commit itself to a cooperative, bilateral process for the development of policy and legislative alternatives.

CONCLUSIONS

There is general agreement that the *Indian Act* is outdated, paternalistic, and simply inadequate for meeting the needs and aspirations of First Nations. Given this context, it may seem odd to the casual observer that some Indian leaders would be opposed to amendments purporting to give more authority and flexibility to First Nations. This position, however, reflects what the Royal Commission on Aboriginal Peoples calls "the paradox of *Indian Act* reform":

Despite being its harshest critics, however, Indian people are often extremely reluctant to see [the *Indian Act*] repealed or even amended. Many refer to the rights and protections it contains as being almost sacred, even though they are accompanied by other paternalistic and constraining provisions that prevent Indian peoples assuming control of their own fortunes. This is the first and most important paradox that needs to be understood if the partnership between Canada and First Nations is to be renewed.⁽¹⁴⁾

(14) Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, Volume 1, Looking Forward, Looking Back*, Ottawa, Ministry of Supply and Services, 1996, p. 259.

The current debate illustrates the continual dilemma with respect to how to amend or eliminate the *Indian Act*; change is needed, but it is difficult to achieve. Some First Nations are anxious to remove what barriers they can in the short term. Others, however, wish to wait until the entire Act is replaced with a more suitable framework for the relationship between First Nations and the federal government, and see acceptance of revisions to an already unacceptable Act as an obstacle to more fundamental change.

CHRONOLOGY

- 1876 - First *Indian Act* was passed.
- 1951 - Last major revision of the *Indian Act*.
- 1985 - Bill C-31 amendments to the *Indian Act* removed discriminatory provisions regarding status and increase band control over membership.
- 1988 - The "Kamloops Amendment" (Bill C-115) to the *Indian Act* was passed establishing the power of band councils to tax reserve lands and enabling Indians to use leases on Indian land as collateral without risking the reserve status of the lands.
 - Bill C-123 amended the *Indian Act* to return greater control over property and estates to Indian people. It also introduced guidelines for bands handling money for band members and for children's trust accounts.
- 1991 - Speech from the Throne committed the government to working with Indian leaders on *Indian Act* Alternatives.
- 4 April 1995 - The Minister of Indian Affairs wrote to chiefs, councillors and leaders of First Nation organizations for their views on potential short-term amendments that could be made to the *Indian Act*.
- 1 September 1995 - The Minister wrote to chiefs, councillors and leaders of First Nation organizations to report on the progress of the amendment initiative. An interim list of the main amendments being considered was issued.
- 4 June 1996 - A list of additional amendments proposed as a result of further responses from First Nations was issued.

17 September 1996 -

The Minister released a list of potential amendments and proposed to introduce legislation into the House of Commons by year-end, provided there was First Nation support for the changes.

12 December 1996 -

Bill C-79, the Indian Act Optional Modification Act, was tabled in the House of Commons. It presented a package of changes to the Act that First Nations may opt into.

